COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-1096

DEUTSCHE BANK NATIONAL TRUST COMPANY, trustee[1]

vs.

MARK A. LEFEBVRE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This is a postforeclosure eviction action in which a judge of the Housing Court entered judgment in favor of Deutsche Bank National Trust Company (Deutsche Bank) on Deutsche Bank's claim for possession. The mortgagor, Mark A. Lefebvre, contends that the foreclosure was invalid because his promissory note to IndyMac Bank, F.S.B. (IndyMac) was never indorsed in the name of Deutsche Bank, the foreclosing entity. We affirm.

Background. On or about April 9, 2007, Lefebvre purchased the property known as 16 McIntyre Court, Marlborough (the property) with a loan from IndyMac in the amount of $263,500. Lefebvre's loan was conveyed to the Home Equity Mortgage Loan Asset-Backed Trust Series INABS 2007-B (the Trust) pursuant to a

[1] Of the Home Equity Mortgage Loan Asset-Backed Trust Series INABS 2007-B, Home Equity Mortgage Loan Asset-Backed Certificates, Series INABS 2007-B Under the Pooling and Servicing Agreement dated June 1, 2007.

Pooling and Servicing Agreement dated June 1, 2007.[2] Deutsche Bank is the trustee and custodian of the Trust. On or about April 17, 2007, Deutsche Bank received Lefebvre's original note, which had been indorsed in blank by Vincent Dombrowski, vice-president of IndyMac.[3] On or about July 12, 2007, Deutsche Bank received the original mortgage signed by Lefebvre (a copy of which is not included in the record appendix).

On or about August 25, 2011, the mortgage was assigned by Mortgage Electronic Registration Systems, Inc. to Deutsche Bank in its capacity as trustee of the Trust, in care of OneWest Bank, FSB (OneWest).[4] The assignment of the mortgage was

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[2] The judge did not make written findings of fact. Details about custody of the note and mortgage set forth herein are taken from (i) a copy of the note itself; (ii) the affidavit of Ronaldo Reyes, dated November 6, 2014, submitted by Deutsche Bank in support of its summary judgment motion; and (iii) the facts admitted by Lefebvre in his statement of undisputed material facts submitted in support of his summary judgment motion, including those contained in the excerpt from the deposition of Kyle Lucas attached to that statement.

[3] The indorsement on the note is comprised of a stamp that says, "PAY TO THE ORDER OF [blank line] WITHOUT RECOURSE," with Dombrowski's signature on behalf of IndyMac underneath.

[4] The record establishes that OneWest was successor to IndyMac and serviced the loan until Ocwen Loan Servicing, LLC (Ocwen) obtained the servicing rights at some point in 2012. These details are relevant only insofar as Lefebvre claims Ocwen was "the actual party in control of the foreclosure." Deutsche Bank states that OneWest (not Ocwen) was the servicer at the time of the foreclosure. In any event, that a loan servicer performed work as the lender's agent in arranging for a foreclosure is immaterial where, as here, the statutory notice was given in the lender's name and the foreclosure was conducted on the lender's behalf. See Khalsa v. Sovereign Bank, N.A., 88 Mass. App. Ct. 824, 828 (2016) ("General agency principles apply in the context

recorded in the registry of deeds on or about October 24, 2011. Accordingly, by October 24, 2011, Deutsche Bank as trustee of the Trust was the record and beneficial holder of the mortgage and was also the holder of the indorsed note.[5]

In early 2012, Deutsche Bank gave statutory notice that the property would be sold at public auction on March 5, 2012, at

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of mortgage foreclosure sales"). Lefebvre admits in his statement of material facts in support of his cross motion for summary judgment that Deutsche Bank (not Ocwen or OneWest) sent the statutory notice of the impending foreclosure to Lefebvre, and the preforeclosure notice reproduced in the record appendix is in Deutsche Bank's name. Moreover, Lefebvre has not specifically claimed that either Ocwen or OneWest conducted the foreclosure in its own name -- which neither of them could have done while Deutsche Bank (and not one of its servicers) held the mortgage. See U.S. Bank Natl. Assn. v. Ibanez, 458 Mass. 637, 648 (2011) ("only a present holder of the mortgage is authorized to foreclose on the mortgaged property, and because the mortgagor is entitled to know who is foreclosing and selling the property, the failure to identify the holder of the mortgage in the notice of sale may render the notice defective and the foreclosure sale void").

[5] The record establishes that in April, 2014, Deutsche Bank shipped the original note to Ocwen (the Lucas testimony includes conflicting statements about whether this happened in 2012 or 2014, but the Reyes affidavit is clear that it was 2014). The note was received by Ocwen directly from Deutsche Bank and then produced by Ocwen at the deposition of Lucas, an Ocwen employee. On or about October 29, 2014, the note was shipped back to Deutsche Bank, which has had custody of the note since that time. These details show that Deutsche Bank had continuous possession of the indorsed note from April 17, 2007, through the date of the foreclosure, and was able to produce that original document upon Lefebvre's request during the discovery phase of this litigation.

12:00 P.M. Deutsche Bank thereafter foreclosed on March 5, 2012.[6]

On or about April 16, 2012, Deutsche Bank served Lefebvre with a summary process summons and complaint having an entry date of April 23, 2012, in which Deutsche Bank sought possession of the property and payment for Lefebvre's use and occupancy.

On or about April 26, 2012, Lefebvre commenced a separate civil action against Deutsche Bank in Superior Court, in which he sought the following: (i) a declaratory judgment that the foreclosure is void; (ii) money damages sounding in tort for physical and emotional harm; and (iii) money damages on a fraud theory.

On May 10, 2012, the Housing Court judge entered a judgment in favor of Deutsche Bank on the summary process claim for possession. Lefebvre's first appeal to this court, see Deutsche Bank Natl. Trust Co. v. Lefebvre, 86 Mass. App. Ct. 1101 (2014) (Lefebvre I); note 6, supra, followed, and was docketed on or about June 20, 2012.

On June 22, 2012, the Supreme Judicial Court handed down its decision in Eaton v. Federal Natl. Mort. Assn., 462 Mass.

[6] Neither the foreclosure deed nor the affidavit of sale are included in the record now before us. We conclude from the foreclosure deed provided in the record appendix filed in Deutsche Bank Natl. Trust Co. v. Lefebvre, 86 Mass. App. Ct. 1101 (2014), that Deutsche Bank was the high bidder at its own auction.

569 (2012). In that case, the court held that to be statutorily entitled to foreclose, a mortgagee must not only hold the mortgage but also must either hold the note or act on behalf of the note holder. See id. at 570. The rule announced in Eaton was to apply prospectively only, to situations where the statutory notice of a foreclosure was given after the date of the Eaton decision. Id. at 589.

About one and two-thirds years later, in Galiastro v. Mortgage Electronic Registration Sys., Inc., 467 Mass. 160, 167 (2014), the Supreme Judicial Court expanded the situations to which Eaton would apply retroactively to include cases in which the issue was preserved and an appeal was pending as of June 22, 2012, the date of the Eaton decision.

Accordingly, on July 2, 2014, this court resolved the appeal in Lefebvre I by remanding the case to the Housing Court "for further proceedings consistent with" Eaton and Galiastro.

A few months later, on September 15, 2014, the Superior Court case was transferred to the Housing Court.[7] When entered in the Housing Court, the Superior Court case was assigned a

[7] In September, 2013, between the Eaton and Galiastro decisions, the Supreme Judicial Court held that the Housing Court had jurisdiction in summary process cases to entertain counterclaims brought by postforeclosure occupants. See Bank of America, N.A. v. Rosa, 466 Mass. 613, 626 (2013).

docket number in the regular civil session.[8] That civil action was eventually consolidated with the then long-pending summary process action.

In November and December of 2014, the parties cross-moved for summary judgment. Deutsche Bank specifically sought summary judgment on both the summary process case and Lefebvre's consolidated claims. In a margin order dated January 16, 2015, the Housing Court judge allowed Deutsche Bank's summary judgment motion "as there is no genuine issue of material fact as to [Deutsche Bank's] right to superior possession."

The Housing Court issued a judgment in favor of Deutsche Bank on February 10, 2015, which was back-dated to January 16, 2015, by "[t]he court acting nunc pro tunc."[9] According to the Housing Court's docket sheet, LeFebvre filed his notice of appeal on February 12, 2015.

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[8] Only the docket sheet in summary process case no. 12H85SP001541 has been made available to this court in the record appendix. We take judicial notice of the docket sheets in Superior Court case no. 1285CV00822 and Housing Court civil action no. 14H85CV000884. See Home Depot v. Kardas, 81 Mass. App. Ct. 27, 28 (2011) ("we may take judicial notice of the docket entries and papers filed in separate cases").

[9] The judgment awards Deutsche Bank possession and costs in the amount of $270. Because Deutsche Bank's motion was allowed in its entirety, we construe the judgment to have resolved all pending claims, including the consolidated Superior Court claims. In Lefebvre's brief, he does not argue that judgment improperly entered on any of his claims, and makes no mention of his request for money damages. Accordingly, he has waived any appeal as to those matters. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

Discussion. There is no genuine issue as to any of the facts recited above. Lefebvre has either affirmatively agreed with those facts, or has failed to produce any countervailing admissible evidence that could call them into question.[10] Instead, this appeal is predicated entirely upon Lefebvre's incorrect legal contention that the note indorsed in blank by IndyMac would have had to have been specially indorsed as payable to Deutsche Bank in order for Deutsche Bank to obtain ownership of it.

A promissory note is a negotiable instrument. See G. L. c. 106, § 3-104. A note is payable to "bearer" if it is indorsed in blank. See G. L. c. 106, § 3-109(c), inserted by St. 1998, c. 24, § 8. A "blank indorsement" is an indorsement of an instrument that is not a "special indorsement." See G. L. c. 106, § 3-205(b), inserted by St. 1998, c. 24, § 8. A "special indorsement" is an indorsement that "identifies a

[10] See Mass.R.Civ.P. 56(e), 365 Mass. 824 (1974) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"). See also Federal Natl. Mort. Assn. v. Hendricks, 463 Mass. 635, 642 (2012) ("If a plaintiff makes a prima facie case, it is then incumbent on a defendant to counter with his own affidavit or acceptable alternative demonstrating at least the existence of a genuine issue of material fact to avoid summary judgment against him").

person to whom it makes the instrument payable." G. L. c. 106, § 3-205(a), inserted by St. 1998, c. 24, § 8.

It is undisputed that IndyMac's indorsement on the note in this case was a "blank indorsement," because it did not name a subsequent payee. Speaking literally, the note was made payable to a blank line. See note 3, supra. Lefebvre contends that "mere possession of a Note does not equate to ownerships [sic]." That contention is incorrect once a note has been indorsed in blank by its named payee.

"When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." G. L. c. 106, § 3-205(b). Accordingly, after IndyMac indorsed the note in blank, it became enforceable by whomever next received it from IndyMac -- in this case, Deutsche Bank. There was no need for any further indorsement by IndyMac or Deutsche Bank to make that transfer effective. See Khalsa v. Sovereign Bank, N.A., 88 Mass. App. Ct. 824, 825 (2016). See also Commonwealth v. Giavazzi, 60 Mass. App. Ct. 374, 377 n.5 (2004) (checks indorsed in blank were payable to bearer). Accordingly, Lefebvre's argument is unavailing.

The instant case is distinguishable from the facts set forth in our recent opinion in Khalsa, supra, in ways that are dispositive. In Khalsa, a genuine issue of fact existed as to

whether the servicer (Sovereign) was acting on behalf of the note holder where (i) the note had been indorsed in blank and was physically held by Federal Home Loan Mortgage Corporation, but (ii) Sovereign, the loan servicer, held the mortgage and was the "lender" named in the default notice.[11] See Khalsa, 88 Mass. App. Ct. at 825. Here, it is undisputed that Deutsche Bank held both the mortgage and the note at the time of the foreclosure, and the foreclosure was conducted in Deutsche Bank's name, on its behalf. Accordingly, in this case (unlike in Khalsa) there was no need for specific proof that any loan servicer was acting at Deutsche Bank's behest.

Judgment affirmed.

By the Court (Katzmann, Meade & Agnes, JJ.[12]),

Joseph F. Stanton

Clerk

Entered: August 31, 2016.

[11] In Khalsa, Sovereign would have been required to foreclose in its own name because it held the mortgage. See Ibanez, 458 Mass. at 648.

[12] The panelists are listed in order of seniority.